IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICKY RAY SEXTON, Appellant.	)	No. 61721-4-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: August 3, 2009

Grosse, J. — Failure to request a mistrial is not ineffective assistance of counsel where it is clear that the request would not have been granted. Here, the defendant objected to the police officer testifying about statements from a non-testifying confidential informant. Defense counsel moved to strike the officer's entire testimony. The trial court denied that motion but afforded the defendant an opportunity to strike particular hearsay statements, and the jury so advised. The defendant declined to do so. Because the trial court supplied a remedy for the hearsay, it was clear that it would not have granted a new trial on this basis.

Additionally, we accept the State's concession that the trial court was required to independently determine whether the defendant's prior offenses constituted the "same criminal conduct" and, finally, finding no merit to any of the issues raised in the defendant's statement for additional grounds, we remand for resentencing, but otherwise affirm the conviction.

FACTS

Ricky Ray Sexton was charged with delivery of methamphetamine, possession

of methamphetamine with intent to deliver, and assault in the third degree based on events that occurred on August 3 and 4, 2006. Sexton moved to suppress evidence seized during the execution of a search warrant obtained by the Auburn Police Department for Sexton's vehicle.

Police testimony at a CrR 3.6 hearing revealed that the police used a confidential informant (CI) to set up a buy with Sexton. The CI, Sean Fitzpatrick, had been arrested earlier on drug charges and agreed to act as an informant in return for consideration by the prosecutor's office. The CI gave the police detailed information regarding his prior drug transactions, some of which could subject the CI to prosecution for drug possession. Additionally, the trial court found the CI credible based on the additional detailed information supplied, including Sexton's description, residential address, and vehicle make.

The CI contacted his dealer by telephone to set up a buy. The CI did not testify at trial and his statements and identification of Sexton as the dealer were ruled inadmissible hearsay. But because Sergeant Brian Williams listened in on the telephone call, Williams was permitted to testify regarding the transaction. Sergeant Williams heard the CI ask a male if he could buy "one-eighth ounce of it." The CI owed $300 from a previous transaction and agreed to bring that money as well as $400 for the current transaction. The male on the other end of the phone agreed to meet with the CI to purchase "some more." The CI set up a meeting at the Muckleshoot Casino.

The CI and police arrived at the casino parking lot. The CI was thoroughly searched when arrested that evening, remained in police custody, and was searched

again. The police gave the CI $700 in prerecorded buy money. Sexton arrived at the parking lot of the casino and the CI went to Sexton's vehicle. When the CI left the car, the police observed Sexton exit his car, go to his trunk, reach in, and then return to the driver's seat in the car. When the CI left Sexton's car, he gave the prearranged "good buy" signal to the police. Officers standing by were instructed to arrest Sexton.

The police approached Sexton and after a struggle restrained him. The police recovered the marked money from the console of Sexton's car. In a search of the vehicle's trunk, made pursuant to a warrant the following day, the police discovered a storage compartment containing two baggies of methamphetamine, a supply of empty baggies, syringes, straws, a spoon, and a scale.

The transaction, including the arrest, were all captured on the Muckleshoot Casino's video surveillance cameras and shown to the jury.

After the State rested, Sexton chose to represent himself and after examination by the court was permitted to proceed pro se. Sexton testified that he went to the casino to meet the CI only to collect the $300 debt owed him. He asserted that the additional $400 found in his car was money that the CI's girlfriend had won at the casino and that he was just holding it for safekeeping. Sexton claimed the arresting officers accosted him and assaulted him during the arrest. He also claimed that someone else must have put the drugs and other items in the trunk of the car.

A jury found Sexton guilty of delivery of methamphetamine and possession of methamphetamine with intent to deliver. He was acquitted of the third degree assault charge. Sexton appeals the judgment and sentence.

ANALYSIS

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Sexton must show both that his counsel's performance was deficient and that he was prejudiced.[1] Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.[2] "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness."[3] In order to prevail on a claim that counsel's failure to request a mistrial constituted ineffective assistance of counsel, Sexton must establish that his counsel's request for a mistrial would have been granted. A mistrial is only appropriate where nothing the trial court could have said or done would have remedied the harm done to the defendant, and the trial court has broad discretion to cure any trial irregularities.[4] Here, Sexton's attorney could reasonably have believed that any request for a mistrial would have been denied based on the trial court's response to his motion to strike Sergeant Williams' testimony in its entirety. To remedy the admission of any hearsay statements, the trial court offered Sexton the opportunity to strike portions of the record before the jury. Sexton chose not to do so. "Deficient performance is not shown by matters that go to trial strategy or tactics."[5] We will not seek to second guess the trial attorney's tactics where they are not manifestly

[1] State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).
[2] State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).
[3] Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 689).
[4] State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).
[5] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

unreasonable.[6]

Same Criminal Conduct

The statute requires an independent determination by the sentencing court in cases where, as here, the defendant raises the issue that his prior offenses constitute the same criminal conduct.[7] The trial court here did not do so and we remand for resentencing.

Statement of Additional Grounds

Sexton initially contends that there was insufficient evidence to provide probable cause for his arrest. The trial court held a CrR 3.6 hearing after which it entered findings of facts and conclusions of law. Unchallenged findings of facts after a suppression hearing are verities on appeal.[8] Sexton has not assigned error to any of those findings and we therefore treat them as verities.[9] The trial court found the CI to be reliable.

The officers witnessed a control buy conducted under surveillance and at their direction. In addition to the CI's admissions against his own penal interest, the trial court found the CI credible based on the additional detailed information supplied,

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[6] In re Pers. Restraint of Stenson, 142 Wn.2d 710, 742, 16 P.3d 1 (2001) (quoting Strickland, 466 U.S. at 689-90).

[7] RCW 9.94A.525(5)(a)(i) states in pertinent part:

> The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a).

[8] State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003) (citing State v. Kinzy, 141 Wn.2d 373, 382, 5 P.3d 668 (2000)).

[9] Acrey, 148 Wn.2d at 745.

including Sexton's description, residential address, and vehicle make. The address was verified by police at the station and the description and vehicle make were verified at the location of the buy.

When the credible CI signaled that he successfully transferred the marked money for drugs, the police had probable cause to arrest Sexton. Moreover, this information was substantiated by the CI's giving Sergeant Williams the baggie of methamphetamine that he received as the other officers approached Sexton's vehicle. Sergeant Williams' personal knowledge regarding the drug transaction is imputed to the arrest team under the "fellow officer" rule.[10] There was ample probable cause to substantiate the arrest and subsequent search.

Sexton next argues that the State failed to prove all of the elements of the crimes. An element of each of the crimes is that it occurred in the state of Washington. Sexton argues that because this occurred on Muckleshoot land, it was not the state of Washington and no jurisdiction existed for the State to make an arrest. RCW 37.12.010 sets forth the State's assumption of criminal jurisdiction over Indian lands within the State:

> The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States . . . .

Sexton's argument fails because "Indians are within the geographical limits of the

[10] State v. Wagner-Bennett, 148 Wn. App. 538, 200 P.3d 739 (2009).

United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union."[11] See also RCW 37.12.030 which states:

> Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

The trial court correctly instructed the jury that the only factual question they needed to resolve was whether the crimes occurred within the state of Washington. The jury so found.

We affirm the conviction and remand for resentencing in accordance with this opinion.

Grosse, J

WE CONCUR:

Leach, J.

Ellington, J.

[11] United States v. Kagama, 118 U.S. 375, 379, 6 S. Ct. 1109, 30 L. Ed. 2d 228 (1886).